**BEFORE THE MACKENZIE DISTRICT COUNCIL**

Under **The Resource Management Act 1991**

And

In the matter of **a submission on the proposed Plan Change 18 to the Mackenzie District Plan**

**Legal submissions**

**on behalf of the Director-General of Conservation**

**Submitter Number: 18**

**Dated: 3 March 2021**

**Department of Conservation | *Te Papa Atawhai***

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## **Introduction**

## My name is Clare Lenihan and I appear as counsel on behalf of the Director-General of Conservation (the Director General).

## The Director General made a submission and further submission on Plan Change 18. The main thrust of the Director General’s submission and further submission were for the Council to provide clearer direction around the protection of significant indigenous biodiversity.

## Several of the Director General concerns have been dealt with in the s42A report, subject to a few matters set out in the evidence of Ms Ching and detailed further below.

## The remaining matter of concern to the Director-General that differs from the position put forward in the s42A report relates to the consent pathway for clearance of significant indigenous vegetation.

## These submissions cover:

### Statutory requirements

### Relevant matters to consider

### What needs to be given effect to (CRPS)

### Proposed provisions

### Scope

### Proposed JWS

## **Evidence**

## Expert planning evidence has been submitted by Ms Ching on behalf of the Director-General.

## **Statutory considerations and relevant matters to consider**

## Section 72 of the Act sets out the purpose of a district plan:

## The purpose of the preparation, implementation, and administration of district plans is to assist territorial authorities to carry out their functions in order to achieve the purpose of this Act.

## Section 74 sets out the matters to be considered by territorial authorities – they must prepare and change their district plans in accordance with:

### Their functions under s31.

### The provisions of Part 2...

### A national policy statement…

## Section 75 sets out the contents of district plans. They must state:

### The objectives for the district

### The policies to implement the objectives; and

### The rules (if any) to implement the policies, s75(1).

## The District Plan must also give effect to:

### A national policy statement...; and

### Any regional policy statement, s75(3).

## The statutory framework for the classification of activities is done via rules under s77A. Any such rules must be examined and assessed in accordance with the requirements of:

### section 32 – are the provisions (rules) the most appropriate way to achieve the objectives (and policies); and

### section 76(3) (District Rules) - in making a rule, the territorial authority shall have regard to the actual or potential effect on the environment of activities, in including, in particular, any adverse effect.

## *Regional Policy Statement*

## The relevant regional policy statement (RPS) is the Canterbury RPS (CRPS).

## Objective 9.2.3 Protection of significant indigenous vegetation and habitats is relevant. Areas of significant indigenous vegetation and significant habitat of indigenous fauna are identified, and their values and ecosystems function protected.

## The Director-General is satisfied with the reference to assessment criteria for identification of significant indigenous vegetation, so the focus is on protection.

## The issue the IDrecotr-General would like you to consider is:

## Is a restricted discretionary activity status the most appropriate way to achieve the objectives of the proposed Plan Change (which the Director-General is largely supportive of)? Does this activity status give effect to Objective 9.2.3 of the CRPS?

## Ms Ching is of the view there is a gap in policy framework for protection that does not give effect to the CRPS (and s6(c) RMA)[[1]](#footnote-2)i.e. there is a different approach to activities (unless identified a SONS):

### With a Farm Biodiversity Plan FBP), clearance of significant indigenous vegetation (irrespective of area) is a restricted discretionary activity.

### Where there is no FBP clearance of significant indigenous vegetation;

### Less than 5000m2 in any continuous 5-year period of a restricted discretionary activity (Rule 1.2.2);

### Greater than 5000m2 in any 5-year continuous period is a non-complying activity (Rule 1.3.1).

## There is nothing in the CRPS which indicates the issue of protection of significant indigenous vegetation and habitats of significant fauna should be dealt with differently, as proposed in the rules.

## There is nothing in the s32 report or the s42A report which set out a resource management reason for the different approach.

## Apart from some minor wording differences, there is large agreement on the objectives which give effect to Objective 9.2.3 of the CRPS. There is nothing in the proposed objectives (or the policies) which provide the rationale for the difference in approach.

## There is a significant difference in the activity status of non-complying, and restricted discretionary activities for what is in essence the same activity – clearance of significant indigenous vegetation.

## This is compared to a non-complying activity, where the gateway test must first be passed – is the decision maker satisfied the effects are minor, or the proposed activity is not contrary to the objectives and policies of the plan?

## In my submission, the changes put forward by Ms Ching:

### Give effect to the relevant provisions of the CRPS (and thus give effect to s6(c) of the Act)

### Are the most appropriate provisions (in the s32 sense and having regard to the adverse effects of clearance of significant indigenous vegetation).

## **Scope**

## In relation to the consent pathway for clearance of significant indigenous vegetation on a farm, after considering the changes proposed in the s42A report, Ms Ching reached a different view to that previously put forward. Reviewing the original submission, further submissions the s42A report and the Canterbury Regional Policy Statement, Ms Ching now considers it is more appropriate the clearance of significant indigenous vegetation (no matter who the user) is dealt with consistently. This means there is no difference in activity status where the clearance is greater than 5000m2 in any 5-year period.

## Although this is a Council hearing, it is useful to consider case law on scope, which deals with appeals to the Environment Court.

## In *Re Vivid Holdings Limited* the Environment Court noted that clause 14(1) requires an answer to the following questions:[[2]](#footnote-3)

### Did the appellant make a submission?

### Does the appeal relate to one of the four matters referred to in subclauses 14(1)(a) to (d)?

### If the answer to (b) is “Yes”, then did the appellant refer to that “provision” or “matter” in their submission?

## In *Option 5 Inc v Marlborough District Council* the High Court stated that:[[3]](#footnote-4)

The words “provision or matter” should be given a liberal interpretation, and thus a narrow technical interpretation of the words should be avoided … As long as it is clear the submitter has broadly referred to the provision or matter in issue this should be sufficient to give the Court jurisdiction to consider the appeal.

## The Environment Court has confirmed that “*A submission must be read as a whole since it may sometimes contain submissions which in themselves suggest relief.”[[4]](#footnote-5)*

## In *Royal Forest and Bird Protection Society Inc v Southland District Council* the High Court held that:[[5]](#footnote-6)

it is important that the assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be approached in a realistic workable fashion rather than from the perspective of legal nicety*.*

## In *Shaw v Selwyn District Council,* the High Court stated that the “workable” approach referred to by Panckhurst J in *Royal Forest and Bird v Southland District Council* requires:[[6]](#footnote-7)

the Environment Court to take into account the whole relief package detailed in each submission when considering whether the relief sought had been reasonable and fairly raised in the submissions.

## The High Court has also indicated that it is:[[7]](#footnote-8)

… implicit in the legislation that the jurisdiction to change a plan conferred by a reference is not limited to the express words of the reference … it is sufficient if the changes directed by the Environment Court can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.

Ultimately, it is a question of procedural fairness. Procedural fairness extends to the public as well as to the submitter and the territorial authority.

## In *Horticulture New Zealand v Manawatu-Wanganui Regional Council* the High Court indicated that:[[8]](#footnote-9)

The essential issue is one of natural justice. Is the matter contended for by the appellant fairly within the scope of that party’s original submission (bearing in mind the broad approach that is required to be taken in accordance with the *Option 5* decision)? What prejudice might be caused?

## In *Albany North Landowners v Auckland Council,* the High Court held that it was lawful to determine the scope of a submission by reference to: (a) another submission; or (b) the regional policy statement. In its assessment the High Court identified that:[[9]](#footnote-10)

There can be nothing wrong with approaching the resolution of issues raised by submissions in a holistic way – that is the essence of integrated management demanded by ss 30(1)(a) and 31(1)(b) and the requirement to give effect to higher order objectives and policies pursuant to ss 67 and 75 of the RMA. It is entirely consistent with this scheme to draw on specific submissions to resolve issues raised by generic submissions on the higher order objectives and policies and/or the other way around in terms of framing the solutions (in the form of methods) to accord with the resolution of issues raised by generic submissions.

## The High Court also stated that:[[10]](#footnote-11)

… the theoretical concerns … about over-extending the recommendations by adopting a top-down approach are offset by the self-imposed requirement that **the planning outcome must be a reasonably foreseen and otherwise a logical consequence of a submission.** This provides a clear bulwark against cross pollination of submissions (vertically or horizontally) in way that is unfair to potential submitters … Framing the scope of general submissions to accord with the RPS and the cross pollination of submissions for the purpose of making recommendations is not per se unlawful.

**[emphasis added]**

## Scope for the above is set out in the table in Appendix 1.

## In my submission, there is scope for you to consider the relief the Director-General has put forward in relation to adopting a consistent framework for clearance of significant indigenous vegetation.

## **Joint Witness Statement (Planners from Genesis and Meridian Energy Ltd)**

## Counsel received what has been labelled as a Joint Witness Statement from the planning witnesses for Meridian Energy Limited and Genesis Energy Ltd, on Monday 1 March.

## Counsel assumed if conferencing involved any of the planners, there would be correspondence circulated to the parties. There was no correspondence indicating some or all the planners intended to conference.

## It was a surprise to receive a JWS where only two planners had participated. There was no invitation to the Director-General’s expert planner, and I note there are other planners who have submitted expert evidence in this process who also weren’t involved (Andrew Willis, Julia Crossman, Ainsley McLeod and Angela Johnston – I am unaware of whether these parties were notified of the conferencing and chose not to participate).

## Expert conferencing is a process in which experts – all of the relevant experts – confer and attempt to reach agreement on issues. The purpose is to attempt to narrow points of difference, assist the Commissioners and potentially save hearing time and costs. I note the Commissioner’s minute (paragraphs [17]-[20]) requested all participants calling expert witnesses liaise amongst themselves, along with the Hearings Administrator, in order to facilitate their respective experts conferencing on matters relevant to their specific areas of expertise.

## Given not all planners participated in the conference, in my view what has been submitted by two of the experts as a Joint Witness Statement:

### is not what is intended as such by the Environment Court practice Note or the Commissioners’ in their Minute: and

### should be disregarded by the Panel.



Clare Lenihan

3 March 2021**Appendix One – Scope for Director General relief**

|  |  |  |
| --- | --- | --- |
| Provisions | Submitter/submission | DOC position |
| General Comments | #8 Environment Canterbury – general comment about the policy approach that will be taken to listing further “sites of natural significance” in the District Plan | DOC further submitted in support and stated *“…it is not clear how these sites, once identified will be treated by the plan framework if they are not an identified SONS in the planning maps*”. |
| #9 Environmental Defence Society – “Failure to identify all SONS” – Relief = mapping of all SONS. | DOC supported this in further submission stating “*it is important that those sites which meet criteria, but aren’t mapped are also protected”.* |
| Several | DOC further submitted in opposition to several submissions seeking greater weight for FBP’s and that they should be voluntary. |
| Policy 9 | n/a | n/a |
| Rule 1.2.1 | #16 Mt Gerald Station, #17 The Wolds Station – amend to a controlled activity | Oppose |
| #9 EDS – Supported FBP’s at a conceptual level sought amendments to “adequately identify biodiversity values including: SONS…” and amendments to MOD. | DOC supported. |
| Appendix Y | #9 EDS – “Amendments to address issues identified”: [see submission for all – they are supper broad]   * Fails to identify sites of significance. * Fails to require identification of recommended outcomes to achieve protection of significant areas. | DOC supported. |

1. Paragraphs 49 Amelia Ching evidence [↑](#footnote-ref-2)
2. *Re an application by Vivid Holdings Ltd* [1999] 5 ELRNZ 271, at para [18]. [↑](#footnote-ref-3)
3. *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC) at para [15]. [↑](#footnote-ref-4)
4. *Re an application by Christchurch City Council* (1999) 5 ELRNZ 227 at para [17] and *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145 at p [37]. [↑](#footnote-ref-5)
5. *Royal Forest and Bird Protection Society v Southland District Council* [1997] NZRMA 408 at p [10]. [↑](#footnote-ref-6)
6. *Shaw v Selwyn District Council* [2001] 2 NZLR 277 at para [31]. [↑](#footnote-ref-7)
7. *Westfield (New Zealand) Ltd v Hamilton City Council* [2004] 10 ELRNZ 254 at paras [73]-[74]. [↑](#footnote-ref-8)
8. *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2013] NZHC 2492 at para [51]. [↑](#footnote-ref-9)
9. *Albany North Landowners v Auckland Council* [2016] NZHC 138 at paras [148] – [149]. [↑](#footnote-ref-10)
10. *Albany North Landowners v Auckland Council* [2016] NZHC 137 at para [153]. [↑](#footnote-ref-11)